KOFY FM and KOFY TV 20 *and* American Federation of Television and Radio Artists. Cases 20–CA–22544 and 20–CA–22545

February 12, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On June 4, 1990, Administrative Law Judge Clifford H. Anderson issued the attached decision. The Charging Party filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] There are no exceptions to the judge's finding, in fn. 2, that the ''Respondent [sic] adduced unchallenged evidence'' that on September 7, 1988, neither bargaining unit involved in this case was ''significantly staffed.'' Moreover, the record indicates that the Union did not have any objective proof, as opposed to a subjective belief, that it had actual majority support in either unit on that date. Accordingly, we find that there is sufficient affirmative evidence rebutting any presumption of the Union's majority support that would have arisen if, as alleged by the General Counsel, the Respondents agreed to recognize the Union as representative of employees in both units on September 7.

Member Devaney, contrary to his colleagues, would not adopt the judge's dismissal of the complaint. In fn. 4 of his decision, the judge failed to resolve a critical credibility issue concerning whether the Respondents initially extended voluntary recognition to the Union. Instead, the judge simply assumed voluntary recognition had been extended and then incorrectly placed a burden on the General Counsel to prove that the Union had majority status in both units at all relevant times. Contrary to the judge's mistaken view, it is well established that the employer has the burden to establish a lack of union majority status. See *Royal Coach Lines*, 282 NLRB 1037 (1987). For these reasons, Member Devaney would remand the case to the judge to resolve the credibility issue discussed above and if the credible evidence establishes that voluntary recognition occurred, then the Judge should determine whether the Respondents proved a lack of union majority status.

Karen V. Clopton, Esq., for the General Counsel.
Joseph A. Schwachter, Esq. (Littler, Mendelson, Fastiff & Tichy), of San Francisco, California, for the Respondents.
Donald S. Tayer, Esq. (Beeson, Tayer, Silbert, Bodine & Livingston), of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard the above-captioned matter in trial on February 1 and 2, 1990, in San Francisco, California. Posthearing briefs were submitted on April 25, 1990. The matter arose as follows.

On March 17, 1989 the American Federation of Radio and Television Artists (the Union or the Charging Party) filed a charge with Region 20 of the National Labor Relations Board docketed as Case 20–CA–22544 against KOFY FM. On that same date the Union filed a second charge docketed as Case 20–CA–22545 against KOFY TV 20 (collectively with KOFY FM, Respondents). Following an investigation the Regional Director for Region 20 issued an order consolidating cases, consolidated complaint and notice of hearing respecting the two cases on May 31, 1989.

The complaint alleges that the Union has been the recognized collective-bargaining representative of appropriate bargaining units of Respondents' employees since September 1988 and that the parties reached full and complete agreement on a new contract with respect to each unit. The complaint further alleges that at all times since October 3, 1988, the Union has sought and at all times since March 1, 1989, Respondents has failed and refused to execute and/or be bound by the agreements reached. The General Counsel avers such conduct violates Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). Respondents in their answer deny essentially all the allegations contending, inter alia, that the Union at no time represented a majority of employees in either unit, that Respondents neither recognized the Union as representative of their employees in the units at issue nor reached agreement with the Union and, finally, that even had they done so, such conduct is impermissible under the Act and cannot be the basis of an unfair labor practice in refusing to sign and/or abide by such agreements.

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence, to call, examine and cross-examine witnesses, to argue orally, and to file posthearing briefs.

On the entire record, including helpful briefs from the General Counsel and Respondent, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT[1]

I. JURISDICTION

At all times material, KOFY FM has maintained an office and place of business in San Francisco, California, and has been engaged in the business of operating a radio broadcast station. At all material times KOFY FM in the course of its business operations has enjoyed annual revenues in excess of $100,000 of which at least $5000 was received from customers located outside the State of California.

At all times material, KOFY TV 20 has maintained an office and place of business in San Francisco, California, and has been engaged in the business of operating a television

[1] As a result of the pleadings and the stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

broadcast station. At all material times KOFY TV 20 has enjoyed annual revenues in excess of $100,000 of which at least $5000 was received from customers located outside the State of California.

The parties agree and I find that Respondents, and each of them, are employers engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Pacific FM is a corporation holding broadcast licenses for Respondents and a third station, KOFY AM. Its president, at all times material, has been James Gabbert. Pacific FM acquired what became KOFY TV 20 in 1980, KOFY AM in 1986 and KOFY FM in May 1988. KOFY FM was acquired from Olympia Broadcasting which had operated the station under the call letters KKCY until late 1987 and KHIT thereafter.

KOFY TV and the Union entered into a collective-bargaining agreement covering announcers in September 1986, which contract expired by its terms in August 1987. The contract was extended from time to time until it expired on May 31, 1988.

On September 7, 1988, Respondents' agent Gabbert, KOFY 20's news director, Charles Snyder, and Pacific's FM's chief financial officer, Richard Blue, met with the Union's counsel, Donald Tayer, and its executive director, Kim Roberts. The General Counsel and the Charging Party contend that on this date Respondents recognized the Union as representing the employees in the following units:

> All full-time and regular part-time newspersons and announcers employed by Respondent at its FM radio station in San Francisco, California.
>
> All full-time and regular part-time newspersons and announcers employed by Respondent at its television station in San Francisco, California.

Various communications and exchanges occurred through the period from this meeting into October 1988. The General Counsel and the Charging Party contend that as a result of these communications, Respondents entered into collective-bargaining agreements respecting each unit. The Union sought Respondents' signature on contracts offered as reflecting agreements reached. Respondents ultimately refused to sign the contracts. The instant charges followed.

B. *Issues and Arguments*

A prima facie case that a valid agreement was reached between an employer and a union includes various factors. Thus, in a typical case it must be established, inter alia, that the union represented a majority of employees in an appropriate unit, that the employer recognized the union as the employees' representative and that complete agreement on a collective-bargaining agreement covering terms and conditions of unit employees was reached.

In the instant case Respondents challenge the Union's majority in each unit, dispute the units' appropriateness, deny that recognition in either unit was granted and, further, contest that agreement was reached with the Union with respect to either unit. The General Counsel and the Charging Party rely on certain legal arguments to establish critical aspects of their prima facie case.

The General Counsel contends that recognition and agreement accrued through the events of September and October 1988 as testified to by Union Agents Tayer and Roberts and supported by various documents introduced into evidence. The General Counsel further argues that Respondents did not challenge the validity of its recognition of the Union, i.e., the underlying majority employee support for the Union in either unit or the appropriateness of either unit for collective bargaining, until more than 6 months after recognition. The General Counsel argues on brief at 7: ''Therefore it is irrelevant whether the Union demonstrated its majority status at the time of Respondents' original recognition,'' and at 9: ''the appropriateness of the unit is not subject to attack beyond the Section 10(b) six-month period. *Morse Shoe, Inc*., 227 NLRB 391 (1976).''

C. *The Threshold Time Bar Issue*

The General Counsel's theory of the case requires findings of majority unit-employee support for the Union based on the time-bar theory described above.[2] That theory, amply supported by a learned marshalling by counsel for the General Counsel on brief of time bar precedent, depends in turn on the correctness of the factual assertio in her brief at 8:

> At no time prior to the filing of the charges [on March 17, 1989] did Respondents attempt to withdraw recognition of the Union based on objective considerations of a lack of majority status.

It is appropriate to turn to the testimony relevant to this contention.

James Gabbert testified that at the September 7, 1988 meeting he raised in various ways the fact that the employee complements in each unit had not yet been selected and that employee support for the Union could therefore not yet be tested. These contentions were disputed by Union Agents Tayer and Roberts.

Respondents' counsel, Robert Lieber, testified that he was in telephone contact with Roberts in January and February 1989 respecting Respondents' intentions regarding signing the contracts the Union had sent them. In two conversations Lieber told Roberts he did not yet have a position on the question. In a third telephone conversation which Lieber placed as occurring ''between the middle and two-thirds of the month'' of February 1989, he testified:

[2] Neither the Union nor the General Counsel attempted to show that the Union had the support of a majority of employees in either unit at the time of recognition or any other time. Respondent adduced unchallenged evidence that on September 7, 1988, neither unit was significantly staffed. The presumption of majority status the Union enjoyed in the unit covered by the extended 1986 contract, see *Barrington Plaza & Tragniew*, 185 NLRB 962 (1970), does not automatically extend to the far larger unit covered by the purported KOFY TV 20 contract. On this record I find neither actual evidence nor any benefit of presumption which may sustain the General Counsel's burden of proof on this issue, should the General Counsel's time-bar argument not preclude direct consideration of the units' expressed sentiments regarding representation.

> [Roberts] asked me what was going on, was the company going to sign the agreements which she had sent to me, and I told her that, no, the company wasn't going to sign them because I couldn't advise my clients to sign pre-hire agreements, and that even if we would get over that hurdle, that there were some substantial problems with the terms of the agreement.
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> . . . .
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> She said that if that was the position the company was going to take, that AFTRA would have to file unfair labor practice charges against the company.
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> . . . .
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> I told her—I wasn't going to tell her not to, because I didn't see any change forthcoming in the company's position, although they were willing to meet to discuss it, and I wasn't going to close the door on that, but I wasn't going to ask her to refrain from filing unfair labor practice charges on the basis that something would definitely come out of those talks.

Roberts recalled only two telephone conversations with Lieber, one in mid-January 1989 and a second in February 1989. Her memory of the second call is similar to Lieber's recitation of their second conversation save that, in Robert's memory, when Lieber told her he did not have a position for her on whether or not Respondents were going to sign the proffered contracts, Roberts testified:

> And I expressed to Mr. Lieber that we were quite anxious about this . . . getting this resolved. That we could see no reason why the agreement should not be executed and implemented and that we were very concerned about getting the H&R matter resolved.
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> And that we were contemplating filing an unfair labor practice charge, if the company was not going to sign the agreements. And, Mr. Lieber said, ''Well, you have to do what you have to do,'' essentially.

Ms. Roberts testified on rebuttal that in her second conversation with Lieber he made no mention of a prehire agreement or the Union's majority status.

I credit Lieber's recitation of the specifics of the third phone conversation with Roberts and find that Roberts had simply combined the latter two calls described by Lieber into a single call in her memory and failed to recall the specific refusal to sign made by Lieber or his supporting rationale concerning the prehire agreements. I so find because the demeanor of each witness convinced me each was speaking truthfully concerning the events. Given my view of the honesty of each witness, I find it much more likely that Roberts would fail to recall the specifics of this mid-February conversation than Lieber would grossly misrecall or fabricate the specifics of the third telephone conversation he related. Simply put, I find it more probable that Roberts misrecalled through failure of memory than Lieber misrecalled through fabrication of a third conversation with Roberts and the insertion of untrue statements made about prehire agreements. Accordingly, I find that Lieber told Roberts Respondents were not going to sign the agreements, inter alia, because they were ''pre-hire agreements.''[3]

I find the credited statement of Lieber in February to Roberts that Respondents would not sign the proffered contracts because they were ''pre-hire'' agreements is a sufficient communication of Respondents' theory that the Union did not possess valid majority support in the units so that this argument is not time barred because not raised within six months of the argued recognition. Thus, I find the words ''pre-hire'' as used by Respondents' labor counsel to the executive director of the Union may be held to encompass the technical circumstances presented by that term including the situation where recognition is granted and/or an agreement is reached at a time when an insufficient number of employees have been hired into the unit to make the action valid in law. Further, since all of February 1989 is within 6 months of September 7, 1988, Lieber's contentions were made within the 6-month period since the recognition.

Having found that Lieber timely asserted the majority issue as a defense, I find the General Counsel may not simply rely on the passage of time to avoid meeting the majority issue. Accordingly, I find the General Counsel bears the usual burden of proof on all issues including those of unit appropriateness and majority status. The General Counsel and the Charging Party having made no sustainable factual contentions respecting union majority status at the relevant times in the units encompassed by the alleged collective-bargaining agreements, I find the General Counsel has failed to establish such majority status. Accordingly, I find Respondents were not obligated to recognize the Union as representative of employees in the units pled in the complaint nor obligated to sign or abide by the proffered contracts.[4] Accordingly, I further find Respondents have not acted in contravention of their obligations under the Act and have not violated the Act as alleged in the complaint. It follows further that I shall recommend that the complaint be dismissed in its entirety.

CONCLUSIONS OF LAW

1. Respondents, and each of them, are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate the Act as alleged in the complaint.

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[3] Counsel for the General Counsel asked and Lieber answered the following on cross-examination:

> Q. You testified earlier that you had mentioned some kind of a prehire agreement. What were you referring to?
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> A. I was referring to the fact that both the television station, in my view, and at the radio station, AFTRA was not the majority representative of the employees.
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> That at the television station, there had been three of them. Then in October, the company had hired a new set of employees for different operations, the new operation, and there were eight, nine employees employed on a staff basis, that is as regular company employees. And AFTRA, at least according to the company, had never had an election, had never presented authorization cards, had never even claimed majority status. And it didn't seem to me as though there was an accretion of any kind, so when the contract was presented on behalf of the unit, freelance and staff people combined, it appeared that AFTRA didn't represent a majority of employees.

[4] Given my findings, it is unnecessary to resolve the remaining credibility issues respecting the September 7, 1988 meeting. Further, since under my findings herein it is not material whether recognition was granted or the contracts were in fact agreed upon prior to Lieber's refusal to sign them in February 1989, I shall make no findings with respect to these contentions.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The complaint shall be and it hereby is dismissed.

[5] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.